IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

RICHARD ANDERSON, Appellant, vs. KAISER GYPSUM COMPANY, INC., Respondent. and ASBESTOS CORPORATION LIMITED; ATLAS TURNER, INC.; BARTELL'S ASBESTOS SETTLEMENT TRUST; BELL ASBESTOS MINES LTD.; BURNS INTERNATIONALSERVICES CORPORATION; CSK AUTO, INC.; DAIMLERCHRYSLER CORPORATION; ELLIOTT TURBOMACHINERY COMPANY, INC.; FORD MOTOR COMPANY; FOSTER WHEELER CORPORATION; GARLOCK SEALING TECHNOLOGIES, LLC; GENERAL MOTORS CORPORATION; HONEYWELL INTERNATIONAL, INC.; KINGSTON LUMBER COMPANY; MACARTHUR COMPANY; METROPOLITAN LIFE INSURANCE COMPANY; OWENS-ILLINOIS, INC.; PARKER LUMBER CO., INC.; PLANT INSULATION COMPANY; PNEUMO ABEX CORPORATION; STANDARD MOTOR PRODUCTS, INC.; THOMAS DEE ENGINEERING CO., INC.; THORPE INSULATION COMPANY; UNION CARBIDE	)	DIVISION ONE No. 56470-6-I **UNPUBLISHED OPINION** FILED: August 14, 2006

CORPORATION; WARREN PUMPS, INC.;)
WESTERN ASBESTOS COMPANY;)
WESTBAY AUTO PARTS, INC.; WESTERN)
MACARTHUR COMPANY; and FIRST DOE)
Through ONE HUNDREDTH DOE,)
)
Defendants,)
_____)

BAKER, J. — Richard Anderson appeals the superior court's order enforcing his settlement agreement with Kaiser Gypsum Company. Because substantial evidence supports the court's finding that Anderson consented to the settlement agreement, the agreement by e-mail is consistent with CR 2A and RCW 2.44.010, and the parties reached a meeting of the minds regarding all essential terms, we affirm.

I.

Anderson sued Kaiser Gypsum and several other defendants for damages stemming from exposure to asbestos-containing products. The other defendants either settled with Anderson or were dismissed, leaving Kaiser Gypsum as the sole remaining defendant.

Kaiser Gypsum moved for summary judgment. The court held a hearing on the motion. Before the court issued its ruling, the parties' attorneys began settlement negotiations via e-mail. LeAnn McDonald, an attorney with Brayton Purcell law firm, represented Anderson. Christopher Marks represented Kaiser Gypsum.

Kaiser Gypsum offered either (1) to settle the case for $20,000 before the court ruled on the motion for summary judgment, or (2) a "high-low" settlement

based on the outcome of the motion for summary judgment. The high-low offer was $10,000 if Kaiser Gypsum won the motion for summary judgment and $35,000 if it lost.

McDonald misinterpreted the offer. She replied by e-mail: "We accept the 20/35K." Marks responded:

> I'm confused. Our counteroffer (below) was (1) $20,000 to settle all asbestos claims now or (2) high-low to settle all asbestos-related claims based on outcome of MSJ as follows: $10,000 if KG wins MSJ or $35,000 if MSJ is denied. What does your client want to do? C.

The parties' e-mail exchange continued as follows:

McDonald:

> We'll take the 20K now.

Marks:

> Done and done. 20K for all asbestos-related claims: past, present and future. C. Your office used to prepare the settlement agreements, which is fine by me, but I'll want to review it before you give it to your client. Otherwise, I'll prepare the agreement. C.

McDonald:

> We'll prepare. Thanks.

Marks:

> Can you notify [Judge] Armstrong so that she doesn't line up a Judge? C.

McDonald (to Judge Armstrong and Marks):

> Dear Judge Armstrong:
>
> Christopher Marks and I have settled the final defendant in Anderson. Anderson is the contested meso case. Brayton

Purcell now has no ACR 26 trials. Thank you.

Subsequently, the court denied Kaiser Gypsum's summary judgment motion. Several days later, Gil Purcell, a partner with Brayton Purcell, notified Marks that there had been a mistake and that there was no settlement agreement. Purcell claimed that Anderson had never authorized the settlement.

Kaiser Gypsum moved to enforce the settlement agreement. After an evidentiary hearing, the court granted the motion.

Anderson refused to sign the settlement agreement. Kaiser Gypsum moved to compel Anderson to sign the release and execute a dismissal of all claims against Kaiser Gypsum. The court ordered Anderson to execute a full release of all claims against Kaiser Gypsum within 15 days. Anderson still refused to comply.

On motion by Kaiser Gypsum, the court ordered Anderson to appear in court on June 10, 2005 to sign the settlement documents. In response, Anderson asked the court to set a trial date or to compel Kaiser Gypsum to enter a CR 54(b) judgment against itself so that Anderson could pursue an appeal. Kaiser Gypsum argued that the time for appeal had passed. Ultimately, Anderson agreed to execute the settlement documents in exchange for Kaiser Gypsum placing the settlement funds in the court registry pending the outcome of Anderson's appeal. Kaiser Gypsum maintained its objection to the timeliness of Anderson's appeal.

Anderson now appeals from the June 10 stipulation and order.

II.

As a threshold issue, the parties dispute whether Anderson's appeal is timely. Kaiser Gypsum maintains that Anderson's appeal should be dismissed as untimely because the October 18 order was appealable under RAP 2.2(a)(3) and Anderson did not appeal it within the 30-day time limit.

It is doubtful that Anderson's appeal is timely. RAP 2.2(a)(3) provides that a party may appeal from "[a]ny written decision affecting a substantial right in a civil case which in effect determines the action and prevents a final judgment or discontinues the action."[1] A party must appeal such a decision within 30 days.[2] The court's order enforcing the parties' settlement agreement affected a substantial right and effectively determined the action because Anderson had no remaining claims to pursue.[3] The settlement disposed of all of Anderson's claims against Kaiser Gypsum, and Kaiser Gypsum was the last defendant in the lawsuit.

When the appealability of an order is uncertain, a party must err on the side of caution and file an appeal within 30 days or risk his appeal being barred. We choose not to dispose of Anderson's appeal on this basis, however, and

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[1] RAP 2.2(a)(3).

[2] RAP 5.2(a).

[3] See Werlinger v. Warner, 126 Wn. App. 342, 347-48, 109 P.3d 22 (2005) (holding that an order that a settlement agreement was unreasonable was appealable even though it was not a final judgment because the order effectively determined the action). Additionally, orders enforcing settlement agreements are routinely appealed. E.g., Brinkerhoff v. Campbell, 99 Wn. App. 692, 696, 994 P.2d 911 (2000), Morris v. Maks, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993).

decide the appeal on the merits.

Anderson first claims that he did not consent to the settlement amount of $20,000 and agree to release and hold Kaiser Gypsum harmless from all future claims stemming from his wrongful death.

The court found that Anderson consented to the settlement agreement. We review the court's factual findings for substantial evidence.[4] Substantial evidence exists when a fair-minded, rational person is persuaded of the truth of the declared premise.[5]

The court's finding that Anderson consented to settle his claims against Kaiser Gypsum for $20,000 is supported by substantial evidence. McDonald testified that, after the summary judgment hearing, she strongly believed that Anderson would lose the motion. She communicated her concerns to Anderson and advised him that his initial demand for damages was ludicrous. She testified that Anderson authorized a bottom-line settlement of $20,000, but requested that she try to get more. After failing to negotiate a larger settlement amount, she accepted the offer to settle for $20,000.

Anderson testified that he agreed to a high-low settlement of $50,000-$20,000, but never authorized McDonald to settle for $20,000 before the court decided the motion for summary judgment. But the trial court did not find Anderson's testimony credible. We defer to the trial court's determination regarding a witness' credibility.[6] McDonald's testimony was sufficient to

[4] Price v. Kitsap Transit, 125 Wn.2d 456, 465, 886 P.2d 556 (1994).
[5] Price, 125 Wn.2d at 465-66.

persuade a fair-minded, rational person that Anderson authorized the settlement amount.

Additionally, the court found that Anderson authorized McDonald to settle all future claims. Specifically, it found that: (1) Anderson consistently deferred to his attorneys to settle his claims, never inquiring whether the settlement agreements resolved potential wrongful death claims or included the obligation to indemnify; and (2) Anderson had signed numerous settlement agreements with other defendants in this case that were in the same format, which included a full release of all claims, an allocation of proceeds between the personal injury action and any potential wrongful death action, and a hold harmless agreement.

Anderson testified that his attorneys executed other settlement agreements on his behalf under circumstances where he did not know of the agreement until he received it in the mail. He testified that he trusted his attorneys to figure out what the right settlement amount was. Kaiser Gypsum presented evidence of settlement agreements between Anderson and other defendants in the case, which all included releases of future claims, allocation between the personal injury action and any potential wrongful death action, and hold harmless provisions. Substantial evidence exists to persuade a rational person that Anderson authorized Brayton Purcell to execute a settlement agreement that included a release of future claims and a hold harmless provision.

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[6] In re Personal Restraint of Gentry, 137 Wn.2d 378, 410-11, 972 P.2d 1250 (1999).

Anderson next argues that the e-mail exchange between McDonald and Marks did not satisfy the requirements of CR 2A and RCW 2.44.010. This is a question of law, which we review de novo.[7]

A court's authority to compel enforcement of a settlement agreement is governed by CR 2A and RCW 2.44.010.[8] CR 2A provides:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

And RCW 2.44.010 states:

> An attorney and counselor has authority:
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> (1) To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of, or any of the proceedings in, an action or special proceeding unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney.

"Both CR 2A and RCW 2.44.010 require a stipulation in open court on the record, or a writing acknowledged by the party to be bound."[9] The purpose is to avoid disputes and to give certainty and finality to settlement agreements.[10]

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[7] Brinkerhoff, 99 Wn. App. at 696.

[8] Morris, 69 Wn. App. at 868.

[9] Bryant v. Palmer Coking Coal Co., 67 Wn. App. 176, 178, 834 P.2d 662 (1992).

[10] Eddleman v. McGhan, 45 Wn.2d 430, 432, 275 P.2d 729 (1954).

Because general principles of contract law govern settlement agreements, informal writings can bind a party to a settlement even though the parties intend to subsequently sign a formal settlement agreement.[11] In determining whether informal writings are sufficient to establish a contract, we consider whether: "(1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract."[12]

The parties' informal e-mail exchange satisfies the requirements of the rule and statute. The agreement was documented in writing via e-mail, which identified the senders. The parties agreed on the subject matter and intended a binding agreement, as evidenced by McDonald's e-mail to Judge Armstrong indicating that she "settled the final defendant in Anderson." Additionally, the terms—20K for all asbestos-related claims: past, present and future—were stated in the e-mail exchange.

Finally, Anderson argues that the parties did not reach a meeting of the minds regarding material terms. He maintains that they did not agree on whether the settlement agreement included the obligation by Anderson to indemnify and hold Kaiser Gypsum harmless for all future claims by his heirs for damages stemming from his wrongful death.

An enforceable contract requires a meeting of the minds on the essential

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[11] Morris, 69 Wn. App. at 868 (citing Stottlemyre v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983)).

[12] Morris, 69 Wn. App. at 869 (citing Loewi v. Long, 76 Wash. 480, 484, 136 P. 673 (1913)).

contractual elements.[13] Whether there is a meeting of the minds is determined by the objective manifestations of the parties.[14] Under this approach, we must "determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."[15] Under the Berg rule,[16] we may consider the surrounding circumstances and other extrinsic evidence to determine the meaning of the specific words and terms used.[17]

The parties agreed to the following settlement: "20K for all asbestos-related claims: past, present and future." We conclude that the parties intended these terms to include future claims stemming from Anderson's wrongful death and an obligation to hold Kaiser Gypsum harmless.

Negotiating a settlement that includes a release of all past, present and future claims, allocation of a portion of the settlement to future wrongful death claims, and a hold harmless provision is consistent with the practice Brayton Purcell established over the course of negotiating Anderson's settlement agreements. Anderson entered settlement agreements with several other defendants in the case, all which included such provisions. Furthermore, after

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[13] Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 125-26, 881 P.2d 1035 (1994).

[14] Hearst Communs., Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

[15] Hearst Communs., 154 Wn.2d at 503 (citing Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle, 62 Wn. App. 593, 602, 815 P.2d 284 (1991)).

[16] Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).

[17] Hearst Communs., 154 Wn.2d at 503.

the agreement with Kaiser Gypsum was reached, McDonald informed Brayton Purcell's "Group Settle" office of the settlement agreement so that it could prepare the final documents, assuming they would be in the standard format. Under these circumstances, it is clear that McDonald was agreeing to a settlement of $20,000 for all past, present, and future asbestos-related claims, including the obligation by Anderson to indemnify and hold Kaiser Gypsum harmless for all future claims stemming from his wrongful death.

AFFIRMED.

Baker, J.

WE CONCUR:

Appelwick, C.J.

Ajid, J.